No. 80834-1

SANDERS, J. (concurring)—Although I concur in the result reached by the majority, I write separately because I believe Jay Pullman has a liberty interest in earning up to a 50 percent reduction in his prison sentence.

While there is no inherent constitutional right to earn early release, state statutes and regulations can create such a liberty interest. *See In re Pers. Restraint of Powell*, 117 Wn.2d 175, 202-03, 814 P.2d 635 (1991). Laws requiring a particular decision create liberty interests, but laws granting a "significant degree of discretion" do not. *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994) (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 463, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)). Therefore whether prisoners have a liberty interest to earn early release turns on whether Washington statutes and regulations give the Department of Corrections (DOC) discretion or not.

The majority holds that "[u]nder the statutory scheme of 'earned early release,' Pullman has no liberty interest in earning credits at a 50 percent rate." Majority at 1. The majority claims, "The statute is clear; offenders have no liberty interest in or

entitlement to a 50 percent reduction in their sentence." Majority at 7. I disagree.

The State conceded Pullman has a liberty interest at stake in his reclassification, but the majority asserts "there is explicit statutory language to the contrary" and goes on to cite RCW 9.94A.7281. Majority at 5 n.3. RCW 9.94A.7281 provides:

> The legislature declares that the changes to the maximum percentages of earned release time in chapter 379, Laws of 2003 do not create any expectation that the percentage of earned release time cannot be revised and offenders have no reason to conclude that the maximum percentage of earned release time is an entitlement or creates any liberty interest. The legislature retains full control over the right to revise the percentages of earned release time available to offenders at any time.

The majority misses the point of this subsection. This subsection refers to the legislature's right to revise the statute to allow for a different percentage reduction in earned release time. If the legislature decides to amend the statute to reduce the percentage of earned release time after the inmate has earned early release time, then the inmate does not have a liberty interest in the early release credit lost because of the reduction. This subsection refers to the percentage number of earned release time. But this case involves an inmate's eligibility to earn early release time. From this subsection alone, we cannot conclude that there is no liberty interest in earned release time.

Former RCW 9.94A.728(1)(b)(ii) (2004) sets forth that "[a]n offender is qualified to earn up to fifty percent of aggregate earned release time . . . if he or she" satisfies various listed criteria. All but one of those criteria deal with objective

determinations of whether and what type of felonies the inmate has committed. The remaining criterion, former RCW 9.94A.728(1)(b)(ii)(A), hinges on whether the inmate is classified as an offender who is "in one of the two lowest risk categories" as determined by a risk assessment performed by the DOC, *see* former RCW 9.94A.728(1)(b)(iii). This criterion also lacks a significant degree of discretion and is led by the statutory mandates in making a determination as to the risk of reoffending. *See Cashaw*, 123 Wn.2d at 144, *quoted by* majority at 6.

As such, whether an inmate is qualified to earn up to 50 percent of aggregate earned release time is dictated by the "'substantive predicates'" defined by statute, not any significant discretion granted to the DOC. *Id.* I would therefore hold that Pullman has a liberty interest in his qualification by statute to earn release time at the rate set forth by statute.

Since Pullman has a liberty interest, due process protections apply. *In re Pers. Restraint of McCarthy*, 161 Wn.2d 234, 240, 164 P.3d 1283 (2007). But as an inmate, Pullman "enjoys more limited due process rights than a criminal defendant." *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 397, 978 P.2d 1083 (1999). When a state attempts to revoke an inmate's state-created liberty interest to early release, the United States Supreme Court has specified the minimum due process procedures that will apply. *See Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). These requirements include notice and an opportunity to be heard. *In re Pers.*

Restraint of Sinka, 92 Wn.2d 555, 565, 599 P.2d 1275 (1979). Pullman had a liberty interest to earn early release that could be revoked only if DOC provided the required due process protections.

DOC's procedures here are sufficient to satisfy minimal due process. First, Pullman's classification was changed based on the four serious infractions he received while incarcerated. Pullman received due process for each of these infractions. Second, soon after the classification counselor noticed an error and updated Pullman's classification, Pullman received a lengthy explanation of the change along with notice of the change. Additionally, Pullman was informed he could appeal to the superintendent, which he did. He was also informed he could review the information in his file used to determine his classification. If there were any errors, DOC would have been able to review those and make the appropriate corrections.

DOC provided Pullman the required minimal process due for his reclassification, so I agree with the majority that Pullman's personal restraint petition should be denied. But certainly Pullman has a liberty interest to earn a 50 percent reduction in his sentence, thus entitling him to due process, which he received.

Accordingly, I concur.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR: